

[To be reported by Lord GARDENSTOUN,]

M I N U T E S

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MULTIPLE-POINDING, at the Instance of *Margaret Gibson* the Widow, and *Archibald Scot*, and others, the Trustees of the deceast *Walter Scot* Baker in Edinburgh, Against the Children of *Helen* and *Margaret Shiells*, Daughters of *James Shiells* Brewer in Portsburgh, and their Tutors and Curators.

ACT. MONTGOMERY. ALT. LOCKHART.

SOLLICITOR MONTGOMERY, for the raisers of the multiple-poin ding, repeated his libel, and represented, that the said deceast James Shiells, upon the 11th May 1762, executed a disposition of his heretable and moveable estate, and he thereby nominated the said deceast Walter Scot to be his executor and trustee, and disposed, to him, for the purposes therein mentioned, the whole moveable estate falling under testament, that should pertain to him at his death (except the household furniture and some other things, which he disposed to his wife) out of which he was to pay his debts, and some legacies; amongst which was 100 l. sterl. to the said Walter Scot himself: And the clause which disposes of the residue of his effects, is in the following words, " And in the fifth place, the remainder of my said moveable estate, to be divided betwixt the children of the said Margaret and Helen Shiells, my said two daughters,

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and

“ and failing children of any one of them, the said
 “ remainder of my said moveable estate shall fall and
 “ pertain to the children of such of my said daughters,
 “ as shall happen to have them, as the same shall
 “ be divided amongst them by the tutors and curators
 “ herein afternamed: And providing and declaring,
 “ that during the time that any of my daughters shall
 “ remain alive without children, the share of the fore-
 “ said remainder of my said moveables, that would
 “ have belonged to her children, if she any had, shall
 “ be liferented by that daughter who has no children,
 “ before any other daughter’s children can succeed.”

And that the said Walter Scot, in consequence of the
 trust reposed in him, did enter to the management of
 Bailie Shiells’s affairs, and turned the same into money,
 discharged the debts, and paid off most of the legacies,
 as will more fully appear from a state of his accompts
 produced in process. That the pursuers, as trustees
 named and appointed by him, are extremely willing
 to render an accompt, and to make payment of the
 balance to any person who can receive and discharge
 the same. But the residue being provided to the chil-
 dren of the said Helen and Margaret Shiells, and none
 of them being yet past child-bearing, the pursuers are
 not in safety to settle with them, or their tutors and
 curators, being still subject to the challenge of such o-
 ther children who may afterwards be born; they have
 therefore brought this process, to have it found and
 declared, that the said pursuers are not obliged to make
 payment to the said defenders, in regard they cannot
 discharge them of the said Walter Scot’s intromissions :
 But that it should be found and declared, that the said
 Walter Scot did faithfully execute the trust reposed in
 him,



him, and that the accompts produced in process, contain a proper state of all his intromissions; and as the said pursuers are extremely willing to accopt to all parties having interest in terms of, and agreeable to James Shiells's settlement, or even to make payment of the balance of said accompts, to such person or persons as the court shall order payment to be made to; Insisted, that the said pursuers and all others, the heirs and representatives of the said Walter Scot, should be exonerated and for ever discharged of his said intromissions; and that the pursuers, in his right, ought to have a gratification for his trouble, besides the expence of this process, and extracting the decret of exoneration to follow hereon.

Mr LOCKHART for Mrs Bryce and her children, and their curators, and for Mrs Jaffray and her children, and the said Henry Jaffrey as their administrator in law, and for his interest, as husband to the said ~~Walter~~ Shiells, Answered, That Mr Scot had discharged his office of executor to Mr Shiells very faithfully, and to the satisfaction of all concerned; and that they had no objection to the approving of his accompts, and ascertaining that these accompts contain a proper state of his intromissions; but that, in his apprehension, the pursuers cannot be serious in saying, that the defenders cannot discharge them of Mr Scot's intromissions, and take payment of the surplus of executry now in his hands; for as to the special legacies left to Mrs Bryce's children, there can be no question. By the settlement, the surplus of Mr Shiells's executry, which is now the subject in question, is to be divided betwixt the children of Mrs Jaffrey and Mrs ~~Shiells~~; the Defenders therefore are the only parties now interested, and it's not enough

Margaret

Bryce

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to say, That Mrs Jaffrey and Mrs Bryce may have more children : the children now existing are in the fee of the subject ; for surely it cannot be *in pendent* until their mothers are past child-bearing, nor was it Mr Shiells's intention it should be so. The obvious meaning of the clause in the settlement, respecting this article, however inaccurately expressed, is plainly, that, whenever the testament was fully executed by converting the effects into cash, paying off the debts and legacies, the remainder was *eo momento* to be divided between the children of the two daughters, if they any had at that time existing ; and that, if either of them should have no children at this period, the daughter without children, should, by way of *solutum*, liferent the share that would have fallen to her children, if she had been blessed with them. This seems to have been Mr Shiells's meaning ; and if the Lord Ordinary shall be of that opinion, it must of course follow, that the defenders are now intitled to take the residue, and to discharge the pursuers. The doctrine the pursuers plead, would involve all parties in numberless difficulties : for, according to their position, the children of Mrs Jaffrey and Mrs Bryce, tho' in never so great straits, behoved to starve, while their mothers were alive, and had a possibility of having more children, unless they had other funds ; for they could neither draw principal, nor so much as even the annualrent of this money, because the extent of their interest therein could not be known. And it would go thus far, as the nature of this question leads the pursuers to plead it, that the pursuers might keep the money in their hands for these thirty years, perhaps, which, in the event of the

the failure of children of one of the ladies, would clearly defeat the defunct's intention in giving that daughter a liferent. And, for clearing up this matter, let it only be supposed, that, at this present period, one of the daughters had had no children, the division it is believed, in that case, would have been extremely simple: the subject, as seems clearly to have been intended by the defunct, would have divided immediately into equal parts; of one whereof the daughter having no children would have got the liferent, and the children of the other daughter the fee, and these children would, at same time, have drawn the other part directly. And if this reasoning is conclusive, it tends to establish the proposition which the defenders maintain, that the division must take place now, without regard to what other children may exist. What interest such other children, on their existence, would have in divesting those who now succeed, and take the money of part of this succession, is a separate question, with which however the pursuers have no concern. The law does not hinder a person from taking up an estate, because a nearer heir, or one equally near, may exist, who may, on such existence, divest him of it, in whole or in part; the law must take its course, according as matters stand when the succession opens; and, upon the existence of other heirs, they must take the remedy the law gives them. Many instances have occurred, where clauses of return have been ingrossed in deeds, without the parties being subjected to find caution for such return. The case of the Miss Aberdeens is well known to the Lord Ordinary, where the Court imposed no such hardship: and here, there is only a simple substitution; with regard to the interest of the ladies; whether, upon the failure of the children presently existing,

isting, they would have an eventual liferent of their childrens share, is a question left to the Lord Ordinary's determination; but, as the ladies are parties to this process, they can take care of their own interest, and it is *ius tertii* to the pursuers to object to that. And as to the present division of the surplus executry, it seems clear, it must be by two equal parts betwixt the children of both sisters, not only from the whole tenor of the disposition granted by Mr Shiells, but also from that part of the clause respecting the matter in question, whereby the division is appointed to be made betwixt, and not among, the children of both sisters; which plainly implies a division by equal halves between the children of both: the subdivision of these halves among the children, would probably have fallen to have been made by the tutors and curators nominated by the defunct, had they accepted; but, as they did not accept, the subdivision must now, it is thought, go *per capita* equally. And that the division of the surplus must be by equal halves, is further apparent from that clause of the settlement, whereby a provision is made, that, during the time any of the daughters shall remain alive without children, *the share of the surplus, or remainder of the moveables, that would have belonged to her children, if she any had, should be liferented by that daughter who had no children.* Now this liferent would have been elusory, had not the testator meant, the division was to be by equal halves. In fine, the defenders, who are the only parties interested in the residue, apprehend that they are in a capacity to discharge the pursuers of Mr Scots intromissions, and to take payment of the surplus; and that this surplus must be divided by equal halves betwixt the children of both the daughters; and that the subdivision of these shares must be

be *per capita* of the children of each daughter equally, leaving it to the children, who may afterwards exist, to *age* against the receivers as accords, for what part of the principal sum only, as may not be *bona fide* spent; as, it is thought, the children afterwards existing could have no claim to any interest incurred or due before their existence. With regard to the claim for Mr Scot's trouble, the defenders are sorry they are not in a capacity to agree to it. They cannot consent for minors and infants; and as Mr Scot got a legacy of L. 100 from Mr Shiells, the Lord Ordinary will judge how far, in law, any allowance can be made to the pursuers for his trouble.

Avifandum to the Lord Ordinary.

26th February 1765.

Lord GARDENSTOUN.

The Lord Ordinary, having considered the above debate, appoints the same to be printed, with the disposition and assignation by James Shiells to his spouse and children, and to be put into the Lords boxes betwixt and this day se'ennight.

FRA. GARDEN.

C O P Y

COPY DISPOSITION and ASSIGNA-
TION, mentioned in the foregoing Interlocu-
tor.

AT Edinburgh the twentieth of May one thousand seven hundred and sixty-two years, in presence of James Stuart bailie, compeared Robert Gray, as procurator for James Shiells after designed, and gave in the Disposition and Assignation under written, desiring the same to be insert and registrate in the burrow court-books of Edinburgh, conform to the clause of registration therein specified : which desire, the said bailie found reasonable, and therefore ordained the same to be done ; whereof the tenor follows : I James Shiells brewar in Portsburgh, near Edinburgh, considering, that by my disposition and deed of settlement, subscribed by me upon the thirteenth day of October one thousand seven hundred and fifty-two, I gave, granted, and disponed to Edward Shiells baxter in Edinburgh, my son, (since deceased,) and his heirs or assignies, my whole heretable and moveable estate that should belong to me at my death ; and failing him by decease, without issue of his body, the same to be divided amongst my three daughters, Helen, Elizabeth, and Margaret, according to the divisions therein mentioned ; but with and under the burdens, powers, and faculties therein specified, and particularly with the burden of the payment to Margaret Hill my spouse, and her executor or assignies, during her lifetime, after my decease, (in case she survive me,) of an yearly free liferent annuity of thirty pounds sterling, payable to her at two terms
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in the year, Whitfunday and Martinmas, by equal portions, beginning the first term's payment thereof at the first of these terms after my death, and so furth yearly and termly during her lifetime, with a fifth part more of liquidate penalty in case of failzie, as the said disposition more fully bears : And whereas, since my granting of the foresaid disposition, the said Edward Shiells, my son, and Elizabeth Shiells, my daughter, are both deceased without surviving issue of their bodies, which makes it incumbent upon me to make a new settlement, in favours of my said spouse and two surviving daughters ; and being now resolved to settle and provide my whole heretable and moveable means and estate, in manner herein after mentioned ; therefore, and for the love, favour, and affection I have and bear to my said spouse, and to my children, grand-children, and relations, herein after named, I do by these presents, with, and under the conditions, provisions, reservations, burdens, powers, and faculties after specified, give, grant, and dispoñe, to and in favours of Helen Shiells, relict of Mr Robert Bryce, minister of the gospel at Drone, my daughter, and of the said Margaret Shiells, now spouse to Henry Jaffrey, merchant in Stirling, also my daughter, equally betwixt them, their heirs and assignies, all and sundry lands, heretages, teinds, tenements, houses, biggings, tacks, possessions, heretable bonds, sums of money, principal, annualrent, and penalty therein contained, and every other heretable subject, presently pertaining, and that shall pertain and belong to me at my death, with the rents, maills, and duties of the same, after that time, together with the haill writs, evidents, rights, titles, and securities of the same, and haill clauses and obligations therein contained, with all that has

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followed, or may follow on the same: Provided always, as it is hereby expressly provided and declared, that my said two daughters, and their foresaids, shall be bound and obliged, as I, by these presents, bind and oblige myself, and my said two daughters, succeeding to me in virtue hereof, or as heirs-portioners to me, to content, and pay to my said spouse, and her foresaids, not only the aforesaid liferent annuity of thirty pounds sterling, yearly, and termly, as the same falls due, in manner, and under the penalties before mentioned, but also to content and pay to my said spouse, and her foresaids, a free yearly additional liferent annuity of ten pounds sterling, payable to her at the same terms, portions, and under the like proportional penalty as her aforesaid annuity of thirty pounds sterling is payable; and likeways, to content and pay to Helen Shiells, relict of James Pillans cooper in Leith, my sister, a free yearly liferent annuity of ten pounds sterling, payable at the same terms, portions, and under the like proportional penalties as my said spouse her liferent annuities are payable: And in case it shall happen my said sister to die before my said spouse, in that case, I further bind and oblige me, and my said two daughters, succeeding to me as aforesaid, to content and pay to my said spouse, another free liferent annuity of ten pounds sterling yearly, payable to her by my said daughters, during all the days of her lifetime, from and after the first term of Whitsunday or Martinmas after the death of my said sister, in the same manner as they are bound to pay the same to my said sister in her lifetime, and that over and above my said spouse her two liferent annuities before written: And further providing and declaring, that in case it shall happen the said Helen Shiells, my daughter

ter to die, and all the children of her body, without issue, in that case the share of my heretage, hereby disposed to her, shall fall, accresce, and belong to the said Margaret Shiells, my other daughter, and to the children of her body, equally amongst them : And, in like manner, if it shall happen the said Margaret Shiells to die, and all the children to be procreate of her body, without issue, in that case, the share of my heretage hereby disposed to her, shall fall, accresce, and belong to her said sister Helen Shiells, and to the children of her body, equally amongst them : Likeas, for the causes aforesaid, and to the end that my moveable estate may be settled, and provided in manner after mentioned, I do by these presents, with, and under the exception, reservations, conditions, provisions, burdens, powers and faculties, herein after specified, nominate and appoint Walter Scot, baxter in Edinburgh, my son-in-law, to be my sole executor, universal legator, and intromitter with my whole goods and gear ; to whom, and in whose favours, as executor and trustee for the purposes herein after mentioned, I hereby bequeath, assign, and dispose, all goods, gear, debts, sums of money, and all other moveable means and estate falling under testament, pertaining and belonging, or that shall pertain and belong, and be addebted, resting, and owing to me at the time of my death, by whatsoever person or persons, whether by bond, bill, decret, accompt, promissary note, or any other manner of way, together with all these documents of debt themselves ; excepting always from the said assignation, my whole insight plenishing and furniture, including plate, heirship moveables, linen and woollen webs cut and uncut, and other moveables of whatever kind, quality, or denomination,

nation, which I hereby assign and dispoſe to, and in fa-
 vours of, my ſaid ſpouſe, free of all debts and oblige-
 ments which may anyways affect the ſame: Provided
 always, that my ſaid executor ſhall be bound and obli-
 ged, out of the firſt and readieſt of my ſaid moveables,
 to content and pay my death-bed and funeral charges,
 with all the debts anyways reſting and owing by me ;
 and thereafter, as my ſaid moveables are made effectua-
 l, to content and pay to my ſaid ſpouſe, children,
 grand-children, and relations after named, the reſpec-
 tive ſums following, viz. In the firſt place, to pay to my
 ſaid ſpouſe the ſum of one hundred pounds ſterling for
 mournings, &c. In the ſecond place, to each of the ſaid
 Helen Shiells and Margaret Shiells, my two daughters,
 the ſum of four hundred pounds ſterling, payable at
 the firſt term of Whitſunday or Martinmaſs after my
 death, with the ordinary annualrent thereof thereafter
 during the not-payment. In the third place, to make
 payment of the ſum of one hundred pounds ſterling, to
 each of James, Margaret, and Elizabeth Bryce, my grand-
 children, payable the ſhares of the ſaid Margaret and
 Elizabeth Bryce, at the firſt term of Whitſunday or
 Martinmaſs after my death, and the ſhare of the ſaid
 James Bryce after he attains to the age of ſixteen years
 compleat, with the ordinary annualrent of my ſaid
 grand-children their reſpective ſums, after the ſaid
 terms of payment, during the not-payment. In the
 fourth place, one hundred pounds ſterling to the ſaid
 Walter Scot himſelf, in full of the like ſum provided to
 him by the ſaid diſpoſition formerly granted by me,
 with the ordinary annualrent thereof, from and after
 the firſt term of Whitſunday or Martinmaſs after my
 death, during the not-payment: And, in the fifth place,
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the remainder of my said moveable estate to be divided betwixt the children of the said Helen and Margaret Shiells my daughters ; and, failing children of any one of my said two daughters, the said remainder of my said moveables, shall fall and pertain to the children of such of my daughters as shall happen to have them, as the same shall be divided among them by the tutors and curators herein after named: Reserving always full power and liberty to the said Walter Scot and Henry Jaffrey, to pay to Thomas Pillans my Nephew, the sum of thirty pounds sterling out of the said remainder of my moveables, if they think proper so to do. Provided always, as it is hereby expressly provided and declared, That after my funeral charges and debts are paid, the aforesaid sum payable out of my moveables to my said two daughters and grandchildren before named, shall not become due and payable, but remain with my said executor, till my said two daughters give sufficient liferent-security to my said spouse, upon all my heretable subjects, for securing her and my sister of the yearly liferent-annuities provided in their respective favours as aforesaid: And in case the free rents, maills and duties of my said heretable means and estate, shall fall short of the aforesaid yearly liferent-annuities payable to my said spouse and sister ; in that case, such intake in payment of the said respective annuities, shall be made up and paid out of the said sum payable to my said daughters, out of my moveables, and they burdened therewith. And further providing and declaring, as it is hereby provided and declared, That during the time that any of my daughters shall remain alive without children, the share of the aforesaid remainder of my said moveables, that would have be-

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longed to her children, if she any had, shall be life-
 rented by that my daughter who has no children, be-
 fore any other daughter's children can succeed. And
 I impwer my said executor, to pay what accompts and
 debts or funeral-charges shall be resting by me, at my
 death, upon my spouse her attestation that such ac-
 compts and debts are due and resting, or upon his
 own proper knowledge of the same, or any other proof
 he shall think needful, without the necessity of consti-
 tuting these accompts and debts legally; declaring al-
 ways, that these presents are granted by me, and ac-
 cepted of by my said spouse, in full contentation to
 her of all provisions by contract of marriage, or other
 provisions made by me in her favours, or what else
 she can expect be and through my death, reserving
 alwaysto me my own liferent-right, use, and interest in
 the haill premisses during my lifetime, and full power
 and liberty to me, at any time in my life, to revoke,
 recal, alter and change these presents, in whole or in
 part: And I hereby revoke, recal, and reseind the
 aforesaid former disposition and deed of settlement,
 made by me, of my heretable and moveable estate, in
 favours of my said son now deceased, and others
 therein mentioned, except in so far as concerns or may
 be extended to an additional security to my said
 spouse, for payment to her of the liferent yearly an-
 nuity of thirty pounds sterling, payable to her thereby,
 as before narrated, and as an additional security to
 the said Walter Scot, for payment to him of the fore-
 said sum of one hundred pounds sterling, payable to
 him by the said former disposition, in the event there-
 in mentioned. And I hereby nominate and appoint
 the saids Walter Scot and Henry Jaffrey, and Mr Wil-
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liam Bryce writer in Stirling, or any two or survivor of
 them, to be tutors and curators to the said James,
 Margaret, and Elizabeth Bryce, my grandchildren, and
 to the children to be procreate of the body of my said
 daughter Margaret, for managing and guiding the
 subject to which they shall have right in virtue hereof;
 declaring hereby, That my said executor and trustee,
 and he and the said Henry Jaffrey and William Bryce,
 as tutors and curators foresaid, shall be liable only for
 their actual intromissions with the subjects hereby com-
 mitted to their charge, with deduction of their neces-
 sary charges and expences, that shall be debursed in
 their respective capacities as executor, and tutors and
 curators, to be ascertained by their honest words; or, in
 case of their deaths, by their accompt-book, without
 further probation; but noways, and on no account, to
 be liable for omissions and not doing diligence. And
 I dispense with the not delivery hereof, and declare
 that, albeit these presents be found lying by me the
 time of my death, undelivered to my said spouse,
 children, grandchildren, or others concerned, yet the
 same shall be a valid evident in their favours, any law
 or practice to the contrair notwithstanding: With the
 not delivery whereof, I hereby dispense for ever; and
 consent to the registration hereof in the books of
 Council and Session, or others competent, therein to
 remain for preservation: And thereto I constitute Robert
 Gray my Procurator. In witness whereof, I have sub-
 scribed these presents, consisting of this and the five
 preceeding pages, written on stamped paper by Wil-
 liam Dunbar clerk to Robert Simpson, writer in Edin-
 burgh, at Portsburgh the eleventh day of May one
 thousand seven hundred and sixty two years, before
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these witnesses, Michael Rob writer in Edinburgh, the said William Dunbar, William Philp cooper in Portf-
burgh, and Thomas Elder my servant. *Sic subscribitur*,
at the desire of the before said designed James Shiells,
who cannot write, as he asserts, on account of his pre-
sent indisposition being known to us, Duncan M'Do-
nald, and Robert Simpson co-notaries public, we do
subscribe the same for him, he having touched the pen
and authorized us to that effect, in presence of the fore-
said witnesses, Robert Simpson N. P. Duncan M'Do-
nald N. P. William Dunbar witness, Michael Rob wit-
ness, William Philp witness, Thomas Elder witness.
Extracted upon this and the seven preceeding pages,
by

JO. WILLIAMSON.

